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Brief of Call for Respondent

In the Supreme Court of the United States.

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OCTOBER TERM, 1897.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, TRUSTEE, AND E. H. HUBBARD, ASSIGNEE OF THE UNION LOAN & TRUST COMPANY,

APPELLANTS AND PETITIONERS,

VS.

TRUST COMPANY OF NORTH AMERICA, TRUSTEE,

APPELLEE AND RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ASA F. CALL, Sioux City, Iowa,
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Counsel for Respondents.

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The petitioner moves this court to issue its writ of certiorari under the provisions of Section 6 of the Act of Congress of 1891, to review the decree of the Circuit Court of Appeals for the Eighth Circuit, which, save for the discretionary power therein conferred, is by the same Section made final and conclusive.

The decision complained of is reported in Volume 82, Federal Reporter, page 124.

The brief of Petitioners bristles with points which are all claimed to be of national importance and peculiar magnitude, but the only point made which has ever been con-

sidered a fairly debatable question is whether a corporation can take advantage of its own wrong to defeat its honest creditors, on the plea of *Ultra Vires*, where the act of borrowing was within the scope of its general powers but contrary to the regulations of the statute.

This question has now been so thoroughly settled by this Court in a long and harmonious line of cases, that it is no longer a debatable subject.

National Bank vs. Matthews, 98 U. S., 621 and 629.

National Bank vs. Whitney, 103 U. S. 99-102.

Fritts vs. Palmer, 132 U. S. 282, 292.

Logan Co. Nat. Bank vs. Townsend, 139 U. S. 67-76.

Thompson vs. St. Nicholas Nat. Bank, 146 U. S. 240-251.

The second point proposed, that a junior creditor of the mortgagor corporation can defeat a mortgage which the mortgagor cannot, has never been considered doubtful, and is now settled.

Graham vs. Railroad Company, 102 U. S. 148-153.

Mattingly vs. Nye, 8 Wall. 370.

Sexton vs. Wheaton, 8 Wheat. 229.

Warfield vs. Marshall Co. Canning Co., 72 Iowa, 666-670.

Garrett, Trustee, vs. Burlington Plow Co., 70 Iowa, 697-701.

National Bank vs. Whitney, 103 U. S. 99-103.

Darst vs. Gale, 83 Ill. 136.

McAllister vs. Plant, 54 Miss. 106.

R. R. vs. Cowdrey, 11 Wall. 459.

Herman on Estoppel, p. 1316.

The third suggestion of Petitioners, that they will prorate with respondents, which has been injected into the case since the hearings in Circuit Court and Circuit Court of Ap-

peals, does not rise to the dignity of a legal question, but partakes rather of the character of bartering and bargaining against established principles of law—under any view not of sufficient importance to call for the interposition of this Court by certiorari.

HISTORY AND STATEMENT OF THE CASE.

The Sioux City Terminal Railroad & Warehouse Company was incorporated under the laws of Iowa, in August, 1889, with A. S. Garretson, T. P. Gere and D. E. Paullin as its provisional board of directors. These persons were also its officers, A. S. Garretson being president, T. P. Gere vice president and D. E. Paullin secretary. Under the articles of incorporation the company reserved to itself the power to build two or more lines of railway north, south, east and west through Woodbury county as well as to purchase and improve terminal grounds and facilities for its lines of railway, and power to own, lease and mortgage the same. The corporation never acquired any lines of railway except such as were contained on the terminal grounds in Sioux City. These grounds were largely acquired in the fall of 1889, consisting of a row of blocks between Second and Third streets in Sioux City extending from Division street on the east to Pearl street on the west, being about one and one-third miles in length, which was improved by lines of railway, tracks, sidings and switches, warehouses, freight and passenger depots. The capital stock of the corporation was one million dollars. The articles of incorporation limited the indebtedness to two-thirds of the capital stock, except such indebtedness as was secured by mortgage upon its property.

The trust deed in controversy was executed and acknowledged on the 1st day of January, 1890, covering and embracing all of the property the corporation then owned or

which might thereafter be acquired, securing bonds of the same date, to the amount of one million, two hundred and fifty thousand dollars ($1,250,000), and this trust deed was recorded with the recorder of deeds of Woodbury county, Iowa, on the 27th day of February, 1890, and the bonds were sold on the open market, at from ninety to ninety-five cents on the dollar and are all outstanding and unpaid.

All of the funds derived from the sale of these bonds were devoted to the legitimate uses of the Terminal Company. A portion was used in paying its floating indebtedness. Another portion was used in paying for and improving its property, and a small portion was used in paying interest upon its indebtedness.

The bonds were sold in Philadelphia and the proceeds of the sale remitted to the Union Loan & Trust Company and by that company placed to the credit of the Terminal Company, one million dollars of the bonds being sold shortly after the trust deed was recorded, and the remainder from time to time as needed for the construction of the buildings on the Terminal grounds.

Prior to the time of the issuance of these bonds and on the 14th day of December, 1889, the Terminal Company had executed a lease to the Sioux City & Northern Railroad company of all its property for a period of one hundred years, at an annual rental of ninety thousand dollars ($90,000), of which rental fifteen thousand dollars ($15,000) was payable directly to the Terminal Company, and seveny-five thousand dollars ($75,000) was to be paid to the trustee under the mortgage, the mortgage in controversy being then in contemplation, this sum of seventy-five thousand dollars being the amount of the annual interest on the one million two hundred and fifty thousand dollars of bonds, and the lease contained the usual provisions of forfeiture and reversion in case of non-payment of the rent provided. The trust

deed not only embraced the property of the Terminal Company, describing the lots and blocks by number, metes and bounds, but also included this lease which had before been executed as additional and collateral security.

During the fall of 1892 and the spring of 1893 the Terminal Company issued its notes to the amount of about seven hundred thousand dollars ($700,000), which were unsecured, and these notes were negotiated through the Union Loan & Trust Company to the various banks which are making this defense.

It does not appear from the record and I understand that it is not the fact that any of these banks held any of the notes of the Terminal Company prior to the fall of 1892. In the latter part of April, 1893, there was a general smash in these railroad properties and the Union Loan & Trust Company, being a large endorser, failed; and just prior to the failure a second mortgage was executed by the Terminal Company securing bonds to the amount of its then outstanding floating paper—about seven hundred and eighteen thousand dollars ($718,000). The mortgage was made to the Union Loan & Trust Company, trustee, and the bonds secured by it were deposited with the Union Loan & Trust Company as collateral, for the benefits of the banks which held this floating paper, it being expressly stated in the second mortgage that it was a second mortgage and was given subject to the first mortgage now in controversy.

In October, 1893, the First National Bank of Montpelier and ten other banks, being holders of the paper of the Terminal Company which was secured by the second bonds and trust deed held by the Union Loan & Trust Company, desiring to avail themselves of this security, filed their complaint in the circuit court, in their own behalf and in behalf of all other beneficiaries under the second mortgage, claiming that they were the equitable owners of the second mortgage on

the Terminal property, alleging the insolvency of the Terminal Company and the maturity of their obligations; and under this proceeding, had a receiver appointed; and in December, 1893, The Trust Company of North America intervened in that cause and alleged its right to collect the rentals under the terms of its trust deed, and an order was then entered giving to The Trust Company of North America the right to collect the rentals. Afterward, in April, 1894, The Trust Company of North America commenced its separate action against The Terminal Company, and all other parties interested, to foreclose the first mortgage because of default in interest on the coupons due the 1st day of January, 1894, and on an application to the circuit court to appoint a receiver under the first mortgage, an order was entered extending the appointment of a receiver already made to the first mortgage, and the case of the First National Bank of Montpelier et al. vs. The Terminal Company was consolidated with the case of The Trust Company of North America against the same defendants, and ordered tried as one cause.

In the meantime the First National Bank of Montpelier and other banks which held the floating paper of the Terminal Company, secured by its second mortgage bonds, had placed themselves in various attitudes of defense against the first mortgage.

As before stated, their first move was to commence an action of foreclosure on the second mortgage, which counsel now say has been practically abandoned but not abandoned of record. The second move was to obtain the control of the Terminal Company by procuring the resignation of its then directors and electing these creditors in their stead, and then to make conveyance of all the property to E. H. Hubbard, trustee; and then, as owner of the property, Hubbard, as trustee, interposes his defense, and being the assignee of the

Union Loan & Trust Company, he interposed a joint defense as assignee of the Union Loan & Trust Company, which was the trustee of the second mortgage. These creditors then organized themselves into a corporation known as the Credits Commutation Company by turning in the notes which they held of the various defunct institutions as assets and taking out stock of the Credits Commutation Company in lieu thereof; and this company then being the owner of the notes of the Terminal Company, brought a suit against the Terminal Company while it was yet in the hands of the receiver which they had appointed and after all its property had already been conveyed by them as directors to Hubbard, trustee, and in this suit a general judgment was obtained in the state court against the Terminal Company for the amount of the floating notes, without regard to the second mortgage security, and then as judgment creditor the Credits Commutation Company make the same defense as was made in the name of Hubbard, trustee, and whether operating in the name of Hubbard assignee, Hubbard trustee, the Terminal Company or the Credits Commutation Company, the interest was the same; and that is, the interest of the parties who held the notes of the Terminal Company which were secured by the bonds under the second mortgage.

DISCUSSION OF QUESTIONS SUGGESTED BY PETITIONERS.

The chief contention of counsel for petitioners is that the Terminal Company was prohibited from contracting indebtedness in excess of two-thirds of the paid up capital stock. Before arguing the legal question involved, I desire to suggest that these petitioners are in a poor situation to question the legality of the first mortgage on such a ground, for whatever might be said against the validity of the first

mortgage, could be said, with much more force, against the validity of their own holdings.

So far as the interests of the Credits Commutation Company are concerned, it is the holder of notes issued by the Terminal Company to various banks, made during the latter part of the year 1892 and the first part of the year 1893 (Record, pages 78–82), and it is not shown in the evidence, and I understand it is not the fact, that any of these banks held any indebtedness of the Terminal Company prior to that date. So far as the record shows, this indebtedness was all created after the bonds in controversy were issued, therefore, it necessarily follows that if any portion of the bonds was invalid because issued in excess of two-thirds of the capital stock, the same argument applies, with much greater force, to these notes held by the Credits Commutation Company, and there is certainly no court of equity which would allow them to perform the evolution of substituting themselves for the Terminal Company after the company had passed into the hands of a receiver, and then by consent obtain judgment against themselves in another jurisdiction, and by this means make a subsequent indebtedness prior in point of validity.

The manipulators of this deal were evidently afraid of the second mortgage security, for they now say that they will waive their security and depend upon this judgment obtained in the state court as the basis of their rights, and the reason for seeking to avoid this second mortgage is found in the terms of the morgage itself, where it provides "that the said premises are free from incumbrance excepting a deed of trust made on the first day of January, 1890, by the said party of the first part and the Trust Company of North America, of Philadelphia, to secure the sum of one million, two hundred and fifty thousand dollars ($1,250,000) of bonds, and the said party of the first part will warrant and defend

the title unto the said party of the second part, its successors and assigns, against all persons whomsoever lawfully claiming the same, *subject to the lien of the said prior trust deed.*" (Record, page 16.)

This clause would, of course, make it extremely difficult for any one to stand upon the mortgage containing it and assert the invalidity of the mortgage to which it was expressly made subject. Therefore, the defense interposed in the name of E. H. Hubbard, assignee of the Union Loan & Trust Company, which was the trustee named in this second mortgage, is practically abandoned in favor of the defense made in the name of the Credits Commutation Company; and the defense made in the name of E. H. Hubbard, trustee, is in no better position, for the instrument under which he holds is merely an amendment to this second mortgage, and to carry out the same purpose and effect. The instrument is found in full in the Record, pages 233–242, and it recites the fact that the mortgage was given for the purpose of securing this floating indebtedness to the Union Loan & Trust Company, and that the same objection is being made to its validity, that it is deemed desirable to carry out the intention of the company and secure the paper, and that Hubbard is a suitable person as trustee, and the second deed is made to him as trustee, but still made as security for the debt and not in payment of it, for the same notes which this second instrument was given to secure were turned over by the various holders to the Credits Commutation Company as unpaid obligations, and they were afterwards sued on in the state court and judgment obtained; therefore, it is apparent that it was not the thought of the operators to cancel the debt and accept the property in payment of it, but only to give an amended mortgage for their better security; and the position under this instrument is apparently also abandoned

in favor of the position of judgment creditor under the name of the Credits Commutation Company.

The history of these various maneuvers shows how earnestly these parties have attempted to put themselves into a position where the later indebtedness of the Terminal Company could be held valid and the earlier indebtedness could be held invalid, on the ground that the company had exceeded the indebtedness permitted by statute.

NEITHER THE TERMINAL COMPANY NOR ANY PARTY HOLDING UNDER IT CAN URGE THE PLEA OF ULTRA VIRES WHEN THE ACT WAS NOT VOID.

The argument of counsel for petitioners has proceeded upon the theory that the bonds and mortgage are void. Most of the cases cited have dealt with void contracts. This is the fundamental error in petitioners' position and if wrong in this, the entire argument has but little application.

If it were true that this contract is void a large number of decisions could be found which held to the doctrine that no recovery could be had upon it and that the recovery, if at all, should be had on a common count; but if the contract were only voidable, the reason for such a ruling would fail and it could not obtain. A void contract is dead and no equitable inclination could give it life. There is nothing there to enforce and the court is powerless to bring it into being; but a voidable contract may be valid under some conditions and void under others. The court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the court upon that question. It is not dead but simply in a position where, under some circumstances, it might be declared dead.

This distinction is wholly lost sight of in the argument of counsel for the petitioners, and it is the first question that ought to be settled in the determination of this case.

It is true that many acts of a corporation are void and especially when it is acting entirely outside of its capacity or authority and beyond the bounds and purposes for which it is created, and in all those cases where the law has declared such acts to be void the contracts made in violation of the law are void and not enforceable, as contravening public policy or in violation of charter rights or beyond the scope of express powers; but such is not the rule where the corporation has simply abused its general power and has gone beyond its prescribed authority in the line in which it was authorized to act. Such acts are voidable and not void.

If the corporation under the law and its charter has general power to do an act but in the doing of it certain rules and regulations are not conformed to, the act is voidable; but if the corporation engage in an occupation or undertaking in which it had no general power to act, or do any business, then its acts are *ultra vires*.

Under its charter and the laws of Iowa this corporation had the power to borrow money; therefore, in borrowing money it was acting within the scope of its powers and its acts could not be *ultra vires* in that respect; but if in the exercise of that act it violated the laws of the state or its charter, its acts in that respect might be voidable, and whether or not they would be declared voidable would depend upon the equities of the case and whether or not justice could be done to all parties under such a holding.

It will be observed that the statute of Iowa does not contain any provision making acts done in violation of it void, and this omission in the statute is significant and amounts to a declaration on the part of the law makers that this is a regulation for the guidance and control of

corporations and was not intended to operate as a fraud on the investing public or a trap for the benefit of scheming manipulators of corporations or as a bar to corporate business, by compelling all persons to investigate the affairs of a corporation before they do business with it, at their peril.

In this case the bonds were all sold on the open market and brought the good, round market price of ninety and ninety-five cents on the dollar, with accrued interest, and proceeds was all devoted to the uses of the Terminal Company and it received the full benefit of the sale of the bonds. (Record, page 89.) Therefore, a holding that these bonds are void, under these circumstances, would create a great injustice between the parties, and it is on this principle that the courts have refused to declare a voidable contract void.

Referring to an analogous case where the same principle was involved, the question turned upon the right of some banks to foreclose mortgages on property of the corporation where the debt secured by the mortgages was in excess of the charter limit, and objections were made to the foreclosure by the general creditors. In the opinion of the court it was said, "The mortgages were given to secure an indebtedness in excess of the amount of the debts the companies, by their charters, were authorized to contract, and it is said that this renders the evidences of the indebtedness, and the mortgages given to secure it, *ultra vires* and void, but on the face of this case this position cannot be maintained. The moneys were received by the companies and used in carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to have the repayment of their money and the companies could execute a valid security for its payment." Allis vs. Jones, 45 Fed. 148.

This case also decides the question raised by petitioners as to whether a judgment creditor is in any better position than his debtor to raise this question, and on that branch of the case it was said that "Skeen cannot be heard to urge this objection because he is not a creditor of the milling companies. Allis became such, if at all, after the indebtedness to the banks had been created and it would seem, therefore, as if he is in no plight to raise the question."

In a recent opinion by Judge Jenkins in the case of the Citizens Bank vs. Hawkins, 71 Fed. 370, the law is also very clearly stated: "An act is *ultra vires* a corporation when it is beyond and outside of the scope of the powers conferred by its founders when the corporation is without authority to perform it under any circumstances or for no purpose. Such acts are wholly void and no contract for their performance can be enforced by or against the corporation, the plea of *ultra vires* being available to either party to the contract. Such was the character of the agreement under consideration in

Thomas vs. Railroad Co. 101 U. S. 71.

Central Trans. Co. vs. Pullman Co. 139 U. S. 24.

There are, however, acts done in excess of conferred powers, illegal as to the shareholders but for which the corporation is liable to innocent parties. As, for example, where the corporation is authorized to perform an act for a specific purpose and performs the act for another and unauthorized purpose. In such a case the plea of *ultra vires* is available to neither party.

Such was the character of the contracts under consideration in

Union Gold Mining Co. vs. National Bank, 96 U. S. 640.

Smith vs. Sheely, 12 Wall, 358.

Bank vs. Matthews, 98 U. S. 621.

Bank vs. Whitney, 103 U. S. 99.

Bank vs. Stewart, 107 U. S. 676.
Fritts vs. Palmer, 132 U. S. 282.
Bank vs. Townsend, 139 U. S. 67.
Thompson vs. Bank, 146 U. S. 240.
Bank vs. Butler, 157 Mass. 548.
Ditch vs. Zellerbach, 37 Cal. 543.

The case of Wood vs. Cory Waterworks Co. 44 Fed. Rep. 147, seems to be in all respects similar to the case at bar. There is the same limitation to the right to incur indebtedness. The same transaction where one party exceeded the limit and the same plea of *ultra vires*. On page 151 Judge Acheson says: "If the construction contract, as a whole, offended against the constitutional and statutory provisions here invoked, the corrective power resides in the commonwealth, which alone can now complain of the completed transaction. *Appeal of Columbia Nat. Bank, supra*. This principle, which indeed is decisive of the entire case, was recognized as sound, and was enforced in Bank vs. Matthews, 98 U. S. 621, where a mortgagor sought to enjoin a sale of the mortgaged premises under a power contained in the mortgage, on the ground that it was taken in violation of the national banking law; and in Fritts vs. Palmer, 132 U. S. 282, where a foreign corporation had purchased land, and taken a conveyance thereof in direct violation of the laws of the state in which the land was situated, it was, nevertheless, held that the corporation took the title as against its grantor, and his subsequent grantee, and that it was for the state alone to question the validity of the deed of conveyance to the corporation."

In the case of Campbell vs. Argenta Gold & Silver Mining Co. 51 Fed. 1, Knowles judge, reviews the authorities on the question of *ultra vires* at great length, distinguishing between those acts which are void and those which are merely voidable, and in a case where the statute of Montana provided that the officers of the Mining Company should not

mortgage its property except in pursuance to the order of the stockholders' meeting, convened by the publication of notice, and the mortgage was given without such notice and without such meeting, it was held that it was, at the most, voidable and not void; and he says, on page 9: "This court feels bound by the rule expressed in Railway Company vs. McCarthy, 96 U. S. 258, and in accordance with it would have to hold that even the corporation and stockholders in this case would be estopped from asserting that the mortgage was void, although it might be held that it was beyond the power of the corporation to execute the same. But holding, as I do, that the mortgage was only a voidable contract, I have no difficulty in maintaining that the corporation and stockholders in this case would be estopped from denying its validity. The bonds sued on in this case were the consideration for the property embraced in the mortgage; neither the corporation nor the stockholders have ever expressed any desire to disaffirm that contract. The contract was entered into with the knowledge of the stockholders; the corporation have held and enjoyed the property so obtained; hence, it would be a wrong to allow the corporation to disaffirm this mortgage, and, if neither the stockholders nor the corporation could now object to this mortgage, much less could the creditors of the Argenta Company object to the validity thereof."

STATUTE CONSTRUED BY THE SUPREME COURT OF IOWA.

This statute has been construed many times by the supreme court of Iowa, and it is held to be a mere regulation for the government and control of the corporation by the authorities of the state, and that it was not intended to permit corporations to defraud their creditors, and that

the courts would not use it to work an injustice between the parties.

Humphrey vs. Patrons Society, 50 Iowa, 607.
Garret vs. Burlington Plow Co. 70 Iowa, 697.
Warfield vs. Marshall County Canning Co. 72 Iowa, 666.

Recognizing the unanimity of these decisions, and in a vain endeavor to avoid their force, counsel for petitioners have urged an argument that the Terminal Company was not a private corporation, but was a *quasi* public corporation, and therefore, that a different rule obtained, and urge that the rule of the county bond cases would be more applicable; but there has been no attempt made to show that under the laws of Iowa, the Terminal Company was not a private corporation for pecuniary profit, and it could not well be urged because the section of the statute upon which counsel relies to defeat the mortgage applies only to private corporations and as he must contend that this limitation is applicable it necessarily follows that he cannot deny the Terminal Company is a private corporation, within the meaning of the chapter. As soon as he proves to the satisfaction of the court that this Terminal Company was not a private corporation organized for pecuniary profit, with the same proof he thoroughly establishes the fact that the section upon which he relies to defeat the mortgage has no application. A reference, however, to the laws of Iowa shows how vain such a contention must be for the statute makes no distinction between railroad and other private corporations. They are all organized under the same general statute and one corporation may have as many different lines of business as it sees fit to reserve to itself. It may own a railroad and run a mercantile business if it so desires, and its public duty does not restrain it from carrying on its private business.

The statute of Iowa, McLain's Code, sec. 1608, provides: "Any number of people may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction, ownership, operation and maintenance of canals, railways, bridges or other works of internal improvement, and the purchase, ownership, operation and maintenance of any railroad sold or transferred under power of sale or foreclosure of any mortgage deed or trust; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

The Terminal Company was organized under this section and is controlled by the provisions of the chapter following.

There is no logical reason assigned, and no authorities cited, to support the proposition that estoppals cannot be urged against a *quasi* public corporation, and there is no authority cited holding that the rule of the county bond cases applies to railroad corporations. Railroads are private corporations and not public in any sense. The term "*quasi* public" has been applied to them because the public retains some kind of control over their actions and they have certain rights and privileges granted and certain duties are imposed upon them, but in every characteristic in which these cases could call for a distinction they are essentially private. They are incorporated for pecuniary profit and managed and directed by their stockholders. Their books are not open to the public and the public is not particularly interested in their pecuniary welfare. They have their officers and directors to act for them and contract for them and bind them by such contracts.

A different rule applies to purely public corporations based on reasons which could not apply to private corporations, dictated from public policy and with the motive of guarding the interests of the public. In dealing with a

public corporation not only its powers and limitations are well known, but the public records disclose all the facts. The amount of public indebtedness can be ascertained from an examination of the public records and, therefore, there is every reason to charge a person doing business with a public corporation with knowledge of the condition of its affairs. Not only this, but the officers of a public corporation do not stand in the same relation to it that the officers and directors of a private corporation sustain. The officers of a public corporation have well defined duties. Their powers are limited by the law that creates them. They have no authority whatever to exceed those powers, and the power is not granted to them to estop the public from asserting its rights and remedies by their official acts; while in the case of a private corporation all its affairs are entrusted to the directors and officers. It is the only way the corporation has of acting and their powers are not limited but they are given full scope and discretion to do whatever might be best to do for the interest of the corporation and, therefore, the corporation is bound by the acts of those who are empowered to act for it.

THESE BONDS BEING SECURED BY A MORTGAGE UPON REAL ESTATE, COME WITHIN THE EXCEPTION OF THE IOWA STATUTE AND ARE, THEREFORE, VALID.

Judge Shiras in Circuit Court held that the statute relied on by Petitioners did not apply to these bonds in controversy because they were secured by an actual transfer of real estate, and this is undoubtedly the plain exception of the statute, although counsel for Petitioners have sought to show, by statements not supported by the record, that the history of this section of the statute would give ground for

the belief that it was not intended to apply to this class of bonds but only to apply to debenture bonds which were secured by the hypothecation of notes secured by a mortgage, but it would seem to be just in the construction of such a statute that the burden should be placed upon the party trying to avoid an honest debt to show by clear and unequivocal language that the act complained of was actually prohibited by the laws of the state and as the section is, in itself, a limitation upon general powers most freely granted, it should be strictly construed; and it would also seem that in the construction of such a statute the plain and ordinary meaning of the language used should be adopted and that previous history, even if true, could not be used to change the meaning of the plain and clear proviso.

If the statute had provided that only debentures were excepted from its terms, there might be some ground for the contention that these bonds were not debentures within the meaning of the term, but the provisions of the statute is not limited to debentures but provides that "debentures or *bonds*" are excepted when they are secured by an actual transfer of real estate securities.

The only room for a quibble is the use of the word "securities" in the plural instead of "security" in the singular, indicating that more than one security was demanded. If the section were to read "and secured by the transfer of real estate security" there could be no possible question over the meaning, for a mortgage is certainly real estate security; but the use of the plural might be said to indicate the requirement of more than one security; but it so happens in this instance that the mortgage does embrace many separate and distinct pieces of property, consisting of lots and blocks in various parts of the city, franchises tracks and depots, which are all pledged as security for the payment of bonds,

equally and ratably, so that the mortgage in controversy not only comes within the spirit of the section, but within its letter.

It is suggested by counsel in argument that such a construction is against public policy, but it is difficult to see why the same policy should not apply to all corporations which secure their indebtedness with real estate. There seems to be no good ground of public policy which would distinguish and say that one corporation might secure its indebtedness by real estate while another could not, or that one might secure its indebtedness by real estate up to a certain amount and another might to any amount; and certainly it would seem ridiculous to contend that a corporation had no power to issue its bonds and secure them by a trust deed on real estate, when it could issue the same bonds with the same security and use them as collateral for loans to any amount. The same ground of public policy applies to all corporations dealing in real estate. The limitation of indebtedness of corporations generally is based on good, sound public policy for the protection of the stockholders as well as of the investing public. The stockholders not being liable for the debts of the corporation and the directors not being liable, there is also a tendency to increase the debt and take many chances of being able to make payment, and this is, no doubt, detrimental to the stockholders and often times dangerous to investors, as they have no means of knowing the amount of the debt created; but where the debt is secured by real estate mortgage on property worth double the amount of the debt, the investor is safe and the stockholder must be reasonably safe in the ownership of the property given for security and, therefore, there seems to be good reason for making the exception in favor of this class of securities, but the same reason would apply to all corporations. There could be no question of public policy that would affect

one, which would not, with equal force, apply to another, and the state itself, and its law makers, must be the judges of what is the best public policy to adopt.

THE REAL ESTATE MORTGAGED WAS ACTUALLY WORTH DOUBLE THE AMOUNT OF THE BONDS.

It has also been suggested that the bonds in controversy, secured by trust deed, do not come within the exception of the statute because the property embraced in the mortgage was not of sufficient value.

The statute provides "such securities to be at least equal in amount to the par value of such bonds or debentures and to be first liens on unincumbered real estate, worth, at least, twice the amount loaned thereon," and it is claimed in argument that the real estate is not worth twice the amount loaned thereon.

It must be the law that the petitioners, making this contention, should prove to the satisfaction of the court that the real estate was not worth twice the amount loaned thereon, for they are the parties who are seeking to show the violation of the law on the part of this corporation. The burden is on them to show a violation. Every step or act necessary to show a violation should be proven by them.

The presumption is that there was no violation of the law; that the officers of this corporation did their duty. The presumption of innocence obtains, and the petitioners have the burden of showing a violation of the law. If, in order to show a violation of the law, it is necessary to prove that the real estat embraced within the mortgage was not worth twice the debt, they have the burden of showing it; and yet, having this burden, they fail to introduce any testimony on the subject, and they have not even a presumption in their aid, for the presumption is that the security was amply

sufficient to secure the bonds, or they would not have sold for their full value on the market; but not content to rest upon a presumption, the respondent introduced evidence upon the subject. Not a great deal, it is true, but it introduced the testimony of one credible witness whose statements have not been gainsayed.

Mr. Garretson testified (Abstract, page 92), in answer to the question as to what the property embraced in the mortgage was worth in 1892, when the last two hundred and fifty thousand dollars of the bonds were sold: "With the buildings and all complete it was worth two and a half million dollars. Couldn't be duplicated at that time for that amount of money—for twice that amount of money, outside of itself, in the city."

This was the only testimony introduced on the subject of values, and, being undisputed, it should be accepted as proving the fact; and the fact being proven, there remains nothing to the argument of counsel.

THE REAL ESTATE MORTGAGED WAS NOT INCUMBERED WITHIN THE MEANING OF THE STATUTE.

It is claimed by counsel for petitioners, in argument, that the mortgage in question does not come within the exception of the statute because the property was previously incumbered.

The statute provides: "Such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate, worth at least twice the amount loaned thereon;" and it is claimed that as a lease had been executed by the Terminal Company to the Sioux City & Northern Railroad Company prior to the date of the execution of the bonds, it created an incumbrance on the property so that the property could not be regarded as unincumbered property; but a very brief re-

view of these two instruments, the lease and the mortgage, will show that it was not the intention to create a prior incumbrance, but that the two instruments were executed as one transaction. The lease referred to provides (Record, page 158): "And, whereas, the said Terminal Company, party of the first part, has been vested with power, by the stockholders and board of directors, to execute and deliver, and will execute and deliver, its first mortgage to The Trust Company of North America, of Philadelphia, Pennsylvania, to secure an issue of bonds to an amount not exceeding one million, two hundred fifty thousand dollars ($1,250,000), which mortgage is to cover, embrace and include all of the real estate of said Terminal Company, and all the rights of way, franchises and all rights acquired or to be acquired under and by virtue of the said ordinances, assignments and transfers aforesaid; and,

"Whereas, It is further provided in said mortgage under said power given as aforesaid, that so much of the rental in this lease provided as shall be necessary to pay the interest upon said bonds and the necessary cost of trusteeship, shall be paid in quarterly installments to the trustee in said mortgage named."

And referring to the mortgage (Record, page 148, the third paragraph thereof) it will be noticed that the mortgage covers and embraces the lease which is assigned as additional security to secure the payment of the bonds and providing that the mortgagee shall have all the rights and remedies of the mortgagor in case of non-payment or default, with the right to enforce a forfeiture in case of non-payment or a violation of any other provisions of the lease

It is evident that these two instruments were considered as one. That the lease was executed for the better security of the bonds and that instead of being a prior incumbrance upon the property it was an additional value to the mort-

gage security. The phrase "prior incumbrance" has reference to a prior adverse interest which lessened the security and could not apply to such an instrument made and created for the purpose of adding to the security and which did actually have that effect. Although there is a difference of a few days in the dates of the two instruments, each had reference to the other, and the rental under the lease being payable to the mortgagee under the mortgage, could not take effect until the mortgage was created. In fact, it was no lease until the mortgage was made because there was no recipient for the rental.

THE TERMINAL COMPANY HAD A RIGHT TO MORTGAGE ITS PROPERTY AND FRANCHISES, AND ITS RIGHT TO DO SO IS NOT QUESTIONED IN THE ISSUES.

It has been elaborateiy argued before this court that the Terminal Company had no power to mortgage its property or its franchises, but there is no issue in the case upon which to base such an argument. The answers of the parties are quite fruitful in the number of reasons assigned why this mortgage should not be foreclosed and why a floating debt should be preferred to a mortgage debt, but this was not one of the reasons assigned in the various answers filed (see Answer, Record, page 44; Answer, Record, page 49; Amendment to Answer, Record, page 53; Amendment to Answer, Record, page 58), and it is a question which was not presented to Judge Shiras nor touched upon in his opinion and, therefore, should not be argued here; but for the purpose of argument, treating the matter as open for discussion, I think I can safely say that there is no warrant in the statute of Iowa for counsel's contention. There is a great deal said in the course of his remarks about rail-

road corporations and corporations for pecuniary profit and other private corporations, but there is no such distinction made under the statute. There are no provisions of law for an incorporation of railroads different from any other corporation for pecuniary profit. They are all organized under section 1 of title IX of the Iowa Code, and there is no prohibition against any corporation organized under that chapter from engaging in any line of business that may seem profitable, or engaging in various lines of business under the same corporate existence.

There is no inhibition in the law against a corporation being organized for the purpose of building a railroad from point to point, in Iowa, and at the same time engaging in the business of buying and selling coal and grain and erecting elevators and warehouses for that purpose; nor from the business of handling live stock, or any other enterprise that they might wish to carry on. That is, under the law, a corporation does not need to be of an exclusive character, simply carrying one line of business; and the law being this broad, the articles of incorporation of this company are warranted under it, and it reserves to itself the right and power to build railroads, to acquire and develop terminal grounds, build the necessary side tracks, switches, and to erect freight and passenger depots, elevators and warehousee, and other lines of business in connection with it; so that this corporation, under the laws of Iowa, had a multiplicity of business to carry on, and various kinds of property included in its ownership.

The franchises which were granted to it were for the particular purpose of enabling it to build its lines of railway, side tracks and switches over the streets and alleys of the city, and belonged to the railroad branch of the business; therefore, whatever right a railroad company has in Iowa to mortgage its fanchises inure to this company, and the fact

that it had other properties and other enterprises and lines of business would not deprive it of the right granted by the laws of the state in connection with its railroad work.

The statute does not say that any corporation engaged exclusively in a railroad enterprise shall have the power to mortgage its franchises, but is much broader in its terms, and covers and embraces all corporations organized under the laws of Iowa and engaged in owning or operating a railroad.

Section 1965 of McLain's Code of Iowa, after providing for the issuance of bonds by corporations, provides: "Such corporation may also secure the payment of said bonds by executing mortgages or deed of trust of the whole or any part of its property and franchises."

It has been suggested that it would be dangerous to claim the protection of this statute for the reason that the law limits the right to mortgage a railroad to sixteen thousand dollars a mile; and perhaps if this corporation had no other property than the railroad, there might be some force in the argument; but as this corporation had real estate worth two and a half million dollars, and only a small piece of railroad, it is quite apparent that the statute limiting the amount that might be placed upon the railroad could have no application to its other property.

The only franchises the corporation had, were, as before stated, the right of way of certain streets and alleys in the city, for the purpose of building this piece of railroad, and the mortgage does not purport to cover the franchise of the company's own existence, but simply the franchises for the right of way granted by the city.

It is said that the Terminal Company has no right to mortgage its franchises because that right was not reserved in the articles of incorporation, and it is true that the articles of incorporation do not expressly grant this power,

but the power of a corporation in Iowa is somewhat different from that of many states. Here there is no charter granted enumerating certain powers, and there is no law requiring the articles of incorporation to enumerate all the powers which the corporation shall possess.

An examination of the Iowa statute, being chapter 1 of title IX of the Code, will show how liberal the Iowa law is in the formation of corporations. All the articles of incorporation need state is that the incorporators do associate themselves together as a corporation, under the laws of the state, stating the general object, duration, capital and limits of indebtedness. The law requires the notice to be more specific. (Sec. 1613 of the Code.) It must contain the name, the general nature of the business, the amount of capital stock, the time of commencement and termination, what officers and persons the affairs are to be managed by, the highest amount of indebtedness, whether private property is exempt, etc.; but the law nowhere requires either the articles or the notice to state the specific powers which the cororation shall enjoy. These are governed and controlled by the law and not by the incorporators, and the law is all embraced in the last clause of section 1608, where it says, "but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided"; and under this section the Iowa courts have held that corporations are possessed of all the powers necessary to carry out the object of their existence in the same degree as natural persons.

The corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry the purpose of its existence.

Home Ins. Co. vs. N. W. Packet Co. 32 Iowa, 223.

For the purpose of effecting the objects of a corporation its powers are as broad and comprehensive as those of an

individual unless the exercise of the asserted power is expressly prohibited.

Thompson vs. Lambert, 44 Iowa, 439.

A corporation has, by implication, the authority to borrow money and execute notes and mortgages, if it is not expressly prohibited. *Ibid.*

The power to mortgage the property of a corporation is incident to the ordinary powers of such corporation.

Dunham vs. Isett, 15 Iowa, 284.

Where the articles of incorporation of a company prohibit a debt of any amount in excess of $25,000, bonds to the amount of $75,000, secured by trust deed, are sustained in the hands of innocent purchasers, on the theory that the corporation had the right to borrow money and that these articles of incorporation were simply regulations for its own control and could not be used to operate against *bona fide* creditors.

Des Moines Gas Co. vs. West, 50, Iowa, 16.

All these decisions go to show that under the laws of Iowa the articles of incorporation are not as strictly construed as a charter, and that the rights, obligations and limitations of a corporation are not strictly confined to the articles. The general objects and powers of a corporation being stated, all other powers necessary to carry out those general powers are granted by implication and need not be specifically mentioned.

THE TERMINAL COMPANY HAS DIRECT AUTHORITY, UNDER THE STATUTE, TO MORTGAGE AFTER ACQUIRED PROPERTY.

Another objection of the petitioners to the validity of this mortgage is that the Terminal Company had no authority to mortgage after acquired property, and it is

said, in argument, that the authority granted by the statute of Iowa, (sec. 1866 of McLain's Code) only applies to railroad corporations, but if it did I would need go no further to find authority, for this Terminal Company is, among other things, a railroad corporation—that is, it owns a piece of a railroad. The general object of its incorporation, as stated in the articles and the notice, was, among other things, to own and operate railroads. These few after acquired lots were a part of its right of way, and, therefore, the right to mortgage these after acquired lots is fully covered by the statute; but even if it were not and there were no statute on the question, there is no law or public policy which would prevent a corporation from mortgaging property to be acquired; and if the mortgage were given embracing property which the corporation did not own, I have no doubt that the subsequent purchase of that property would inure to the benefit of the mortgagee the same as the after acquired title of a grantor inures to his grantee under a previous warranty.

THE PETITIONERS ARE NOT IN POSITION TO URGE PLEA OF *ULTRA VIRES* IN THIS CASE.

A large part of Petitioners' brief is devoted to the question of *ultra vires* and while I feel that it is wholly unnecessary, if not improper, to devote further time and space to this question, as it has so often been analyzed by this court and others, yet perhaps a brief review of some of the authorities may not be improper.

As I have before remarked, these Petitioners have sought in every conceivable way to place themselves in some position where they could be heard to urge the plea of *ultra vires*, but under whatever name they may style themselves, or whatever may be the form of the lien they secure—whether it is a second mortgage, or a second trust deed, or a judg-

ment lien—the one bald fact always remains controlling, and that is, that their indebtedness was not created until more than two years after the trust deed in controversy was recorded, and therefore they have no right to complain —no more or better right than the Terminal Company itself —for when their indebtedness was created our mortgage was in existence and the public records disclosed the fact. They placed their money with full knowledge of the situation. They were bound to know that the property of the Terminal Company was bonded and having placed their money while their debtor was in this situation, they cannot afterwards be heard to change it to any other or further extent than the Terminal Company could be heard.

This case in this respect is analagous to those cases where the debtor has fraudulently disposed of his property, with intent to defraud his creditors. His prior creditors can complain because they have some interest in the matter as a part of the property which may have induced them to make their advancement has been taken beyond their reach, but a subsequent creditor has no right to complain for he is bound by the situation in which he found the matter. This seems to be the rule, except in cases where the debtor disposed of his property with the intent to defraud those to whom he expected to be made indebted.

Graham vs. R. R. Co. 102 U. S. 153.

See, also, *Porter vs. Pittsburg & B. Steel Co. 7 Sup. Ct. Rep. 754.*

The question then turns as to how far a corporation can be heard to urge its own wrong and reap an advantage thereby. To plead to a court to do an act of injustice to its creditors. To invoke the aid of the law to legalize a steal from innocent parties. To trade upon its powers and play hide-and-seek with its creditors. I assert the proposition that where a contract has been wholly performed by both

parties and it is within the scope of the general powers of the corporation, no court of respectability in this country has ever decided that a contract would be declared void and an injustice created.

The leading case of modern times, is the case of The National Bank vs. Matthews, 98 U. S. 621, which is a case where a bank sought to enforce a real estate mortgage taken in direct violation of the statute.

In this case a number of analogous cases are cited and reviewed, and Justice Swayne, on page 629, says: "We cannot believe that it was meant that stockholders and, perhaps, depositors and other creditors should be punished and the borrower rewarded, by giving success to this defense whenever the offensive facts shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." And he cites with approval, this extract from Sedgwick (Stat. and Const. Constr. 73): "Where it is a simple question of authority to contract, arising either on a question of irregularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

The same rule has been applied whether the corporation was seeking to avoid the contract in violation of law or whether the person dealing with the corporation was seeking to avoid his liability because the contract was in

violation of the law. The authorities recognized this principle as being the same.

In construing this National banking law, this court places great stress upon the thought there was no penalty prescribed for a violation of the law, and says it cannot believe that congress intended that the contract should be void if made in violation of it, because it would have been so easy to say so, and the fact that congress refrained from saying so led the court to believe that the only penalty which should attach would be the forfeiture of the charter under which the bank was doing business, and this thought of the majority of the court has a material and important bearing upon the construction of the statute under consideration, because the language of the statutes are very similar.

This decision of the court is fully adhered to in the case of National Bank vs. Whitney (103 U. S. 101); and these cases are very important in another aspect of the case; that is, that there was no innocent party asserting the estoppal. All parties to the contract had equal knowledge and equal opportunity for knowledge. They were in *pari delicto*. The same rule and the same line of reasoning has been applied by Justice Brewer under a similar statute and similar facts, where all the parties were cognizant of all the matters, refering to the case of *Poole vs. West Point Butter & Cheese Association* (*30 Fed. Rep.*), where on page 520, he says: "One other matter is suggested, and that is the illegality of the increase of the stock from $25,000 to $250,000, and the limitation both in the statute of Nebraska and in the charter of the company against the amount of indebtedness. The complainants hold only stock which was thus irregularly issued, and I do not think it lies in their mouth, or, indeed, in the mouth of any of the original stockholders cognizant of the fact, and assenting thereto, to question the liability of the corporation for the entire debt

created in favor of the Middletown Bank. No man can plead his own wrong to defeat an honest debt. I shall therefore have to find against the claim of the complainant to priority of payment over the cross-complainant." And in the analagous cases arising in the supreme court of the United States, where the statute of the states prohibit a foreign corporation from owning or acquiring title to lands within its borders, the courts say that while such contracts are in violation of the law, they are not void, and only the state can take advantage of it, and in support of this doctrine they cite the case of Bank vs. Matthews (98 U. S.) above quoted, and other cases of a similar nature.

See Fritts vs. Palmer, 10 Sup Ct. Rep. 93.

And in the analagous cases where the statute of the state prohibits a corporation from entering into a contract until the articles of incorporation were filed, the supreme court of the United States say the restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff and he has no right to raise the question of its invalidity, citing again the case of Bank vs. Matthews.

In a case where a railroad issued its own bonds to its own stockholders, in violation of the law, because issued without consideration, Judge Wallace quotes with approval this extract from the case of Parish vs. Wheeler (22 N. Y. 494): "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. If an action cannot be brought directly on an agreement, either equity will grant relief or an action in some other form will prevail"; and Judge Wal-

lace further said: "The present case is phenomenal in the audacity of the attempt to induce a court of equity to assist a corporation to repudiate its indebtedness to its creditors without offering to return the property it acquired by its unauthorized contract with them. A fundamental maxim is 'That he who seeks equity must do equity.'"

Memphis & L. R. Co. vs. Dow, 19 Fed. Rep. 389-394.

If such an attempt is considered audacious by the courts, what would be said of the attempt of these petitioners in their endeavor to subrogate themselves to the rights of *bona fide* holders of first mortgage bonds, bought and held in good faith for over two years before these petitioners loaned their money on the security of the equity in the property? Such affrontery is so unfamiliar to the courts that it has not yet been christened.

In an able opinion by Judge Cooley in the case of Day vs. Spiral Spring Buggy Co. (23 N. W. Rep. (630), on page 630, he says: "It is to be observed that the contract, though void in law, involved no element of criminality and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal and immoral action. The plaintiff had a right to sell her manufacture and to be paid for it. The defendant has received something of value from her and there is manifest equity in its being required to make payment notwithstanding it exceeded its power in the purchase."

In Beach on Corporations (section 424): "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith performed by the other party and the corporation has had the full benefit of the contract."

In the case of Manchester R. R. vs. Concord R. R., in the supreme court of New Hampshire (20 Atlantic Rep 383) in

a case where a railroad company brought suit for an accounting and for the recovery of a large amount of rolling stock and other property, the defense was made that the contract was *ultra vires* and wholly without the authority of either corporation. The court says: "The defense sought is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it only need be said, in equity at least, neither party to the transaction *ultra vires* simply will be heard to urge its invalidity while retaining its fruits. However the contractile power of the defendants may be limited by its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through the unauthorized contract; nor, as a corporation, is it exempt from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."

Morawetz in his work on Corporations (sec. 666) says: "The intention of the legislature must always be sought for in deciding upon the legal effect of the words contained in the law or charter; and unless it appears that the legislature intended to render a forbidden act or contract absolutely void in legal contemplation, it will not be so held."

Now applying this rule to the statute under consideration, it will be observed that there is no penalty attached to a violation of it, much the same as the national banking act, providing that a bank should not take real estate except under certain specific circumstances. There is no provision following which says that the act or contract or obligation shall be void, and therefore, under this rule, the courts will not declare such contracts to be void. If it does not so provide, the contracts are valid, if they have been executed by one of the parties, and in such cases only the state can interfere.

In constraing this statute it should be remembered that the whole trend of modern authority is in the direction of justice and equity between the parties. Every modern case is a protest against the ancient law of *ultra vires*. The doctrine was pernicious in all of its effects. It was simply a legalized cover for theft which would enable corporations acting under intricate charters to lawfully steal from the people who did business with it.

I respectfully urge that the construction and interpretation given to this statute by the supreme court of Iowa is entitled to great consideration. It is fair to presume that the supreme court of the state has some knoweldge of the intention of its legislative branch in making these laws, and have some judgment as to the policy of the state in dealing with its corporations; and the judgment of the supreme court of Iowa on the question as to whether this section was intended to be a guide for the regulation of corporations, and a weapon in the hands of the officers of the state to compel certain lines of conduct, or whether it was intended as a shield for corporations to avoid their just indebtedness, should be of great value. And in the absence of controlling reasons to the contrary, ought to be almost a guide for the judgment of this court, for such construction and interpretation by the highest court of the state it might be said, almost becomes a part of the statute itself.

In the cases before cited, from the supreme court of Iowa, this question was squarely decided. In the case of Humphreys vs. Patrons Association, 50th Iowa, 610, in which an agent for a corporation advanced money for the corporation in excess of its legal limit, Judge Rothrock says: "In our opinion, however, the limit imposed by the amended articles upon the company's power to contract indebtedness, would not necessarily have the effect to exempt the company from liability for indebtedness assumed to be contracted in excess

of the limit. It has been held, it is true, that a municipal corporation is not liable for indebtedness assumed to be contracted in excess of the limit. Carter vs. City of Dubuque, 35 Iowa, 416. But we know of no case where a private corporation has not been held, at least to the extent of the consideration received, for indebtedness assumed to be contracted in excess of the limit imposed in the articles of incorporation. There is good reason for making a distinction between municipal and private corporations in this respect."

This case was followed in the case of Garrett vs. Burlington Plow Co., 70 Iowa, 697. This was a case where the directors of a corporation brought suit against it for indebtedness in excess of the statutory limit. The court, in the statement of facts, on page 699, say: "The directors, with knowledge of the existence of corporate debts beyond the limit prescribed by the articles of incorporation, and the insolvency of the company, and knowing that the other creditors, who had given it credit in ignorance of these things, were pressing their claims, caused the mortgage in suit to be executed in order to indemnify themselves."

In this case the counsel for the defendant conceded the ordinary doctrine of *ultra vires*, but claimed the directors who had acted for the corporation in creating the indebtedness could derive no benefit or advantage from their mortgage. But the court held that as no fraud was alleged the claim was a valid one in their hands.

These two cases are also followed in the case of Warfield vs. Marshall County Canning Company, 72d Ia., 666. There would seem to be no ground upon which the case at bar can be justly distinguished from these cases. In these, the parties were fully acquainted with all the facts, and in neither of these cases did they stand in the relation of innocent holders for value without notice, having full knowledge of all the matters; and the supreme court have held them entitled to

recover; and again, they have been held entitled to recover on their respective contracts, and they were in no case relegated to an action for money had and received, and the mortgage security was enforced.

But it is very strenuously urged by counsel, that the Credits Commutation Company, one of the petitioners, is in better position to urge the question of *ultra vires* than the mortgagor would be, and in better position than they would be as second mortgagees. But on what principle of law or logic this position is founded, I have not been able to discover. As before pointed out in the statement of the case, this Credits Commutation Company is simply a creature of the occasion; it is new in name, but old in experience; it is a new dress on the same old house. This company paid nothing for the notes, except its stock, and its stock was no better than the notes it bought. The holders of the notes, before they took on their new name, had commenced this suit by trying to foreclose their second mortgage; and without dismissing that case, and still holding on to the receivership which they obtained by commencing that case, and any other incidental advantages which they might reap therefrom, they now try to abandon their first proceeding, and the security with it, without dismissing, and come out in a brand new dress, claiming to be innocent, and, forgetting the past, endeavor to plank themselves in the position of *bona fide* holders.

It is plain that in equity this concern can have no better standing than the Terminal Company under which it holds.

As a judgment creditor, whatever of title it has, must came through the judgment debtor. And in a warfare against a prior mortgagee its fight must be based wholly upon the fight which the mortgagor could make. Getting on these new stilts may raise them higher in the air, but give them no firmer foundation.

Darst vs. Gale, 83 Ill. 136.
McAllister vs. Plant, 54 Miss. 106.
R. R. vs. Cowdry, 11 Wall. 459.
Herman on Estoppal, page 1316.

Counsel for petitioners have never before had sufficient courage to claim that any equity existed in favor of their clients; and have never yet disputed the proposition that the real equity of the controversy was with the respondent. As was stated in their oral argument, they base their right to recover on the limitation of the law, and not upon their equities; nor could they well claim equity, for the respondents, with the care of prudent business men, placed their money on mortgage security, which they placed on record in the proper place, and did all things which the law required them to do to protect their mortgage lien, while the petitioners, with more courage and less circumspection, trusted their funds on the unsecured paper of these financial boomers at a greater rate of interest, but without tangible security; and now, when it becomes apparent that the decreasing values compels some one to lose, they come into a court of equity, without showing equity, asking that the mortgage security of the respondents be abrogated for their benefit.

THE OFFER.

The so-called offer of Petitioners, presented for the first time in Petition for Rehearing in Circuit Court of Appeals, proposing to pro rate with Respondents in the first mortgage lien, is difficult to understand from a legal standpoint.

If the Respondent's mortgage is valid under the law, there would seem to be scant ground upon which petitioners could claim any benefit under it, inasmuch as their claims were created two years subsequently.

If the mortgage were held invalid, there would be no necessity, in the present action, of determining the respective equities of the parties.

In an appropriate action the amount of the legal debt could be determined, and the rights of the respective holders protected.

Counsel for petitioners claim that in this offer they are proposing a great bargain, which it would be well to accept before conditions modify their position.

This practice appears to be novel at least, and after considerable research we are unable to cite authority as to its effect. If permitted, it would seem to a large degree to obviate the necessity for evidence and books, for all the court would require would be the respective bargains of counsel, and then award decree to the most successful trader.

Upon the whole case, the Respondent submits that the Petition is without merit, and there are no questions involved presenting a conflict of decision, or matter of public importance.

It is respectfully submitted that the petition should be denied.

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Joseph H. Call

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